

September 16, 1992

The Honorable Yukio Kitagawa, Chairperson
Board of Agriculture
1428 South King Street
Honolulu, Hawaii 96814-2512

Attention: Robert A. Boesch
Pesticides Program Manager

Dear Mr. Kitagawa:

Re:Applications for Certification as Pesticide Applicator;
Continuing Education Class Records

This is in response to your letter requesting an advisory opinion from the Office of Information Practices ("OIP") regarding whether the Department of Agriculture ("DOA") must publicly disclose the above-referenced records concerning an individual whom the DOA certified to be an applicator of restricted pesticides ("certified applicator").

ISSUES PRESENTED

I. Whether, under the Uniform Information Practices Act (Modified), chapter 92F, Hawaii Revised Statutes ("UIPA"), the DOA must make the approved application and examination score ("exam score") of a certified applicator available for public inspection and copying.

II. Whether, under the UIPA, the DOA must make available for inspection and copying its record of the continuing education classes that a certified applicator has attended, as required for certification renewal.

BRIEF ANSWER

Under the UIPA, the DOA must make available for public

inspection and copying the following information contained in an approved application for pesticide use certification: the certified applicator's name, business address, category of pesticide use for which the individual is certified, and the status of certification. In our opinion, the disclosure of this information would not fall within the scope of the UIPA exception to disclosure for "[g]overnment records which, if disclosed, would constitute a clearly unwarranted invasion of privacy." Haw. Rev. Stat. . 92F-13(1) (Supp. 1991). In reaching this conclusion, we note that with respect to individuals who are granted "licenses" or "permits," which serve a function similar to certification, section 92F-12(a)(13), Hawaii Revised Statutes, expressly makes this information available for public inspection and copying.

The certified applicator's business address would not fall within the "clearly unwarranted invasion of personal privacy" exception even if the address is also the certified applicator's home address. However, in order to avoid a clearly unwarranted invasion of privacy, the DOA should not disclose a certified applicator's home address that is not used as a business address.

In contrast, we believe that a certified applicator has a significant privacy interest in the applicator's exam score and also in the DOA's record that lists the continuing education classes attended by the certified applicator for purposes of certification renewal. In weighing this significant privacy interest against the public interest in disclosure under the UIPA's "balancing" test, we find that there is little public interest in the disclosure of this information about a certified applicator because it reveals nothing about government conduct.

Thus, we conclude that the disclosure of an applicator's exam score and record of continuing education classes attended would constitute a clearly unwarranted invasion of personal privacy. Therefore, the DOA should not publicly disclose this information.

FACTS

Pursuant to chapter 149A, Hawaii Revised Statutes, the DOA is directed to establish, in administrative rules, the "fees, procedures, conditions, and standards to certify persons for the use of restricted pesticides." Haw. Rev. Stat. . 149A-33(1) (Supp. 1991). An individual may not use or apply restricted pesticides unless the person is a certified applicator or is under the direct supervision of such an

applicator. Haw. Rev. Stat. . 149A-31(3) (Supp. 1991). An individual may apply to the DOA for certification as either a "commercial" applicator (one who will be using the restricted pesticides upon other persons' properties), or a "private" applicator (one who will be using the restricted use pesticides exclusively upon the individual's own property). Commercial applicators may be certified for specialized categories of pesticide use, for example, fumigation, plant, or termite pest control.

To apply for DOA certification, an individual must submit to the DOA a completed copy of the "Application for Permanent Certification as a Commercial Applicator of Restricted Pesticides", or the "Application for Permanent Certification as a Private Applicator of Restricted Pesticides".¹ Blank copies of these applications are attached as Exhibits "A" and "B" respectively. In order to qualify for certification, an applicant, among other things, must pass a written examination administered by the DOA.

Every five years after an applicator receives initial certification, the applicator must apply to the DOA to renew the applicator's DOA certification. In order to qualify for renewal of DOA certification, a certified applicator must have attended continuing education courses approved by the DOA. The number of hours that a certified applicator spends in attendance at these classes must be no less than the minimum number required for the category of pesticide use for which the individual is certified.

The DOA tracks the number of hours that each certified applicator spends in continuing education courses from attendance rosters obtained directly from the continuing education course instructors.

The DOA frequently receives requests from organizations such as the Hawaii Farm Bureau Federation and the Hawaii Pest Control Association for the names and addresses of certified applicators. Consequently, the DOA requested the OIP for an advisory opinion regarding whether the UIPA requires the DOA to make available for public inspection and copying: (1) application

¹The titles of these applications are misleading because certification is not "permanent" but must be renewed by the individual every 5 years.

information about certified applicators; (2) the certified applicators' examination scores; and (3) the continuing education classes courses that the applicators attended for DOA certification renewal. In its request, the DOA noted that many private applicators conduct their businesses from their homes and, therefore, list their home addresses as their business addresses.

DISCUSSION

I. APPLICATIONS AND EXAM SCORES

The UIPA sets forth the general rule that "[a]ll government records are open to public inspection unless access is restricted or closed by law." Haw. Rev. Stat. . 92F-11(a) (Supp. 1991). The UIPA sets forth exceptions to this general rule. Relevant to application information maintained by the DOA is the exception for "[g]overnment records which, if disclosed, would constitute a clearly unwarranted invasion of personal privacy." Haw. Rev. Stat. . 92F-13(1) (Supp. 1991). According to the UIPA, the "[d]isclosure of a government record shall not constitute a clearly unwarranted invasion of personal privacy if the public interest in disclosure outweighs the privacy interests of the individual." Haw. Rev. Stat. . 92F-14(a) (Supp. 1991).

In addition, section 92F-12(a), Hawaii Revised Statutes, lists certain records, or categories of records, that the Legislature declared shall be made available for public inspection and copying "as a matter of public policy," including "[r]osters of persons holding licenses or permits granted by an agency which may include name, business address, type of license held, and status of the license." Haw. Rev. Stat. . 92F-12(a)(13) (Supp. 1991) (emphasis added); S. Conf. Comm. Rep. No. 235, 14th Leg., 1988 Reg. Sess., Haw. S.J. 689, 690 (1988); H. Conf. Comm. Rep. No. 112-88, Haw. H.J. 817, 818 (1988); see also, OIP Op. Ltr. No. 90-28 (Aug. 23, 1990) (licensed contractors). The Legislature intended that, as to those records listed in section 92F-12, Hawaii Revised Statutes, the "exceptions such as for personal privacy" would not apply. Id.

The UIPA does not define the meaning of the terms "license" or "permit." In accordance with principles of statutory construction, we shall construe these terms to have their ordinary or usual meanings. See Haw. Rev. Stat. . 1-14 (1985). The dictionary definition of the term "license" includes "a

permission granted by competent authority to engage in a business or occupation or in an activity otherwise unlawful." Webster's Ninth New Collegiate Dictionary 688 (1988).

Because, under section 149A-31(3), Hawaii Revised Statutes, certification by the DOA authorizes an individual to use restricted pesticides, an activity that would otherwise be unlawful, DOA certification arguably serves the same purpose as an agency's granting a "license" or a "permit" to an individual to engage in any other regulated activity. Consequently, in our opinion, the "clearly unwarranted invasion of personal privacy" exception should not apply to certified applicators' names, business addresses, and categories and statuses of certification just as it does not apply to the same information with regard to individuals who have been granted licenses or permits. See S. Conf. Comm. Rep. No. 235, 14th Leg., 1988 Reg. Sess., Haw. S.J. 689, 690 (1988); H. Conf. Comm. Rep. No. 112-88, Haw. H.J. 817, 818 (1988). Further, we note that with respect to commercial applicators who are also licensed by the Department of Commerce and Consumer Affairs ("DCCA") as pest control or fumigation operators, this information is already made public in the DCCA's licensing records. Haw. Rev. Stat. . 92F-12(a) (13) (Supp. 1991).

According to the facts presented, most private certified applicators reside at their places of business and list their home addresses as their business addresses on their applications. We previously opined that an individual's home address and telephone number should not be disclosed under the UIPA's "clearly unwarranted invasion of personal privacy" exception. See, e.g., OIP Op. Ltr. No. 89-16 (Dec. 27, 1989); OIP Op. Ltr. No. 91-1 (Feb. 15, 1991); and OIP Op. Ltr. No. 91-8 (June 24, 1991). However, we believe that a private certified applicator has a diminished privacy interest in the applicator's home address when the applicator uses that address to openly conduct business with the public. In reaching this conclusion, we note that the State of Hawaii Department of Taxation routinely discloses home addresses when those addresses are used as business addresses set forth on individuals' applications to obtain tax identification numbers for general excise, use, employer's withholding, or transient accommodations. See Dep't of Taxation, Admin. Directive 89-1 (April 5, 1989).

We believe that the public interest in a certified applicator's business address is the same regardless of whether

such address is also the applicator's home address. Therefore, in the absence of a significant privacy interest, we believe that under the UIPA, the disclosure of a certified applicator's business address would not constitute a clearly unwarranted invasion of privacy even where that address is also the individual's home address. Further, information on the application form regarding a private applicator's general excise tax number, property tax key number, and acreage must also be made available for public inspection and copying because this information is already publicly available in general excise tax applications and real property tax records respectively.

However, in our opinion, the DOA should not disclose a certified applicator's home address that is not used as a business address, for example, when a different business address is provided. In such case, the home address would be protected from disclosure under the "clearly unwarranted invasion of privacy" exception. See, e.g., OIP Op. Ltr. No. 89-16 (Dec. 27, 1989) and OIP Op. Ltr. No. 91-8 (June 24, 1991).

As for the exam score that a certified applicator received when applying for DOA certification, we believe that the certified applicator has a significant privacy interest in this information. Cf. Haw. Rev. Stat. . 92F-14(b)(7) (Supp. 1991) (significant privacy interest recognized in "[i]nformation compiled as part of an inquiry into an individual's fitness to be granted . . . a license"); OIP Op. Ltr. No. 90-14 (March 30, 1990) (significant privacy interest in civil service examination scores). In our opinion, the disclosure of a certified applicator's exam score does not further the public interest behind the UIPA of shedding light upon the decisions, actions, or conduct of government agencies or officials. See, e.g., OIP Op. Ltr. No. 89-16 (Dec. 27, 1989) and OIP Ltr. No. 91-2 (Feb. 25, 1991) (discussion of the public interest to be considered in applying the UIPA's "balancing test").

Because a certified applicator's privacy interest in the applicator's exam score outweighs the public interest in the disclosure of this information, the DOA should not disclose this information in an individually identifiable manner in order to avoid a clearly unwarranted invasion of the applicator's privacy. See Haw. Rev. Stat. . 92F-13(1) (Supp. 1991). However, if exam scores are maintained in a readily retrievable form and can reasonably be segregated from information

identifying the individual certified applicators, the exam scores must be publicly disclosed after the deletion of information that would likely result in actual identification of the applicators. See OIP Op. Ltr. No. 90-14 (March 30, 1990) and OIP Op. Ltr. No. 91-24 (Nov. 26, 1991) (interview scores).

II. CONTINUING EDUCATION CLASSES

As noted above, we believe that DOA certification serves a function that is similar or identical to an agency licensing function. Thus, in order to determine whether the UIPA requires the disclosure of the continuing education classes taken by a certified applicator, we find useful guidance in UIPA provisions regarding how this information should be treated with regard to a licensee. Specifically, section 92F-14(b)(7), Hawaii Revised Statutes, expressly recognizes that an individual has a significant privacy interest in "[i]nformation compiled as part of an inquiry into an individual's fitness to be granted or to retain a license." Haw. Rev. Stat. . 92F-14(b)(7) (Supp. 1991) (emphases added); see OIP Op. Ltr. No. 91-1 (concluding that a licensee has a significant privacy interest in education and training required for licensure).

In view of this UIPA provision recognizing a licensee's significant privacy interest, we believe that a certified applicator would similarly have a significant privacy interest in information concerning the individual's "fitness" or qualifications for certification renewal, including the continuing education classes taken to fulfill the prerequisite for renewal. Yet, while the disclosure of this information would reveal the specific continuing education courses that a certified applicator has taken, it would shed little, if any, light upon the conduct or activities of the DOA or its officials. Thus, we find little public interest in this information because it reveals nothing about "what government is up to." See OIP Op. Ltr. No. 89-16 (Dec. 27, 1989).

On balance, we find that a certified applicator's privacy interest in information concerning their continuing education courses taken is not outweighed by the public interest in the disclosure of the continuing education courses taken by the applicator. Consequently, the DOA's individually identifiable continuing education records must not be publicly disclosed in order to avoid a clearly unwarranted invasion of privacy. See Haw. Rev. Stat. . 92F-13(1) (Supp. 1991).

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CONCLUSION

A certified applicator's name, business address (even if it is also the applicator's home address), category of pesticide use in which the individual is certified, and status of certification constitute public information under the UIPA because the disclosure of this information would not constitute a clearly unwarranted invasion of privacy, nor does it fall within any other UIPA exceptions to required agency disclosure.

The DOA should not disclose a certified applicator's home address that is not used as a business address, exam score, or continuing education classes taken for certification renewal because this information is protected under the UIPA's "clearly unwarranted invasion of personal privacy" exception.

Very truly yours,

Lorna J. Loo
Staff Attorney

APPROVED:

Kathleen A. Callaghan
Director

LJL:sc